Rights and Remedies at Risk:

Implications of the Brexit Process on the Future of Rights in the UK

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ABSTRACT

This article provides a taxonomy of the impact of the Brexit on human rights, categorised by the degree of risk posed by the process of separation and legal reform during and following withdrawal from the European Union. First providing an overview of the envisioned Brexit legal process, it outlines what will be lost, critically at risk, vulnerable to repeal, and at low risk of removal. It considers the loss of effective remedies; the (avoidable) uncertainty of EU and UK citizens' rights; the exclusion of the EU Charter of Fundamental Rights from incorporation as retained EU law; the implications of extensive delegated powers to amend retained EU law; and the systematic removal of executive and state accountability mechanisms under the European Union (Withdrawal) Act 2018. It assesses the potential impact of removing the foundation of equality, worker and consumer rights, and the acute vulnerability of 'new' rights. It argues that even where protections are not lost, they are critically at risk or significantly and substantially weakened. It questions whether common law and domestic remedies could fill the gap left in rights protection, exploring the complexities and contradictions arising from the new constitutional (un)settlement of powers. By categorising the impact of the Brexit process on rights by risk, this Article establishes the acute vulnerability of the UK's framework of rights protection during and after the Brexit Process.

1. INTRODUCTION

A. UK Withdrawal from the European Union: Certainties and Uncertainties

Having triggered the Article 50 notification process in March 2017, nine months following the surprising result of the EU Referendum, the UK is to withdraw from the European Union on 29 March 2019 if there is no agreement with the EU, or following an extension or a transition period with an agreement.[1] While there is continued uncertainty as to the likelihood of any agreement with the EU concerning withdrawal or any future arrangements, it is clear that the process by which UK will separate from the EU legal system will radically change the constitutional foundations of the UK. A new (un)settlement of the separation of powers between the executive, courts and parliament has emerged since the Referendum, encapsulated in the arguments of sovereignty, rights and the rule of law in and outside the Supreme Court in *Miller*.[2] The Supreme Court recognised that the ECA is 'not itself the originating source of' EU law but rather a 'conduit pipe' by which EU law is introduced into domestic law,[3] such that it 'constitutes EU law as an entirely new, independent and overriding source of domestic law'.[4] The judgment reached by both the High Court and Supreme Court in

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[1] Under the draft Withdrawal Agreement, the transition period will end on 31 December 2020, but this may be changed in the event of an extension to the Article 50 process.
[2] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583.
[3] [2017] UKSC 5; [2017] 2 WLR 583, [65].
[4] *Miller* [80].

Miller[5] was predicated in part on the potential loss of rights for the individual, and the judgments emphasised that only Parliament, and not the exercise of a royal prerogative by the executive, could legislate in a manner which impacted on individual rights.

The UK government responded to concerns by promising that the Brexit process will not have a negative impact on rights.[6] Arguing that existing protections in the common law, the Human Rights Act 1998 [HRA], and elsewhere in the legal system provide sufficient if not equivalent safeguards, the government downplayed the relevance of the EU Charter of Fundamental Rights, general principles of EU law, and directly effective EU Treaty Rights in the framework of rights protection in the UK. However, this position is categorically untrue. The Brexit process *will* inevitably and negatively impact rights protection in the UK. Where certain rights are not wholly lost in Withdrawal, the removal of external oversight and obligations to rights instruments, as well as the excision of quasi-constitutional entrenchment of rights which resulted from EU Membership, not to mention the rejection of robust remedies for the violation of rights, will cumulatively and systematically weaken accountability, redress and remedy mechanisms against the (ab)use of executive and legislative power.

As with any consideration of the Brexit process, a first and important methodological health warning: there is still a highly degree of uncertainty as to how, when and in what way the UK will withdraw from the EU.[7] Much will depend on an agreement, *if* there is an agreement, with the EU.[8] Conditions for a future relationship with the EU *could* be predicated on adherence to rights principles. For example, the European Parliament has indicated that continued security cooperation between the UK and the EU would be conditional on remaining part of the ECHR.[9] Any future agreement could even be the first of many (an experience of neighbouring countries of the EU)[10] as the EU, the UK, and their legal relationship is subject to constant and ongoing consultation and (re)negotiation. As of February 2019, and only weeks before the deadline, optimism for a 'Deal' with the EU seems misplaced, and there is little or no certainty regarding the future.

Without a legally binding EU-UK Withdrawal Agreement, this article is based on what scope there is for certainty. It draws primarily from the European Union (Withdrawal) Act 2018 [EUWA], outlined in the next section. While the EUWA is predicated on the assumption that there *will* be a Withdrawal Agreement with the EU, its framework of the process by which the UK legal system, and so rights protections, is the most likely design and direction of the Brexit process ahead.[11]

B. Overview of the European Union (Withdrawal) Act 2018

[5] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin). The Divisional Court identified three categories of rights (1) those capable of replication in UK law; (2) those derived as citizens in other member states; and (3) the rights of participation in EU institutions that cannot be replicated, [56]-[57].

[6] See eg Department for Exiting the European Union, 'Charter of Fundamental Rights of the EU: Right by Right Analysis' (5 December 2017). In context of Northern Ireland see Joint report from the negotiators of the EU and the UK government on progress during phase 1 of negotiations under Art. 50 of the TEU on the UK's orderly withdrawal from the EU, para 53.

[7] This article is based on the state of the law as of February 2019.

[8] At the point of writing, it is uncertain as to whether there will be sufficient support for the ratification of the Withdrawal Agreement in Parliament.

[9] Rob Merrick, 'Theresa May bows to EU by keeping UK in human rights convention after Brexit, enraging Tory right' The Independent 12 July 2018.

[10] See eg Liisa Leppävirta and Päivi Leino 'Does staying together mean playing together? The influence of EU law on co-operation between EU and non-EU states: the Nordic example' (2018) EL Rev 295; and Zheng Sophia Tang 'UK-EU civil judicial cooperation after Brexit: five models' (2018) EL Rev 648.

[11] The Immigration and Social Security (EU Withdrawal) Bill as introduced has followed the EUWA model: repealing retained EU law relating to free movement (Clause 1), and delegating sweeping powers to reform the immigration system with even fewer limitations than the EUWA (Clause 4, Clause 5).

The European Union (Withdrawal) Act 2018 is designed to deliver the legal separation of the UK from the EU, and to shape the process of incorporation and legal reform which will follow it. Broadly, the EUWA will first repeal the European Communities Act 1972 [ECA] on 'exit day'.[12] To prevent a situation whereby a very significant amount of EU-derived law would cease to have legal authority by repeal of the ECA, the EUWA will then save EU-derived domestic legislation through incorporation into the domestic legal system.[13] Direct EU legislation, such as EU regulations or decisions, which have effect before and on exit day, are also incorporated into the domestic law.[14] The task of incorporation is complicated by the diversity of EU law norms within the UK legal system: some primary acts are directly based on EU obligations (eg Equality Act 2010), while binding obligations are also sourced in directly effective EU law (eg non-discrimination on the basis of nationality).

The EUWA removes the principle of supremacy from any law passed after exit day but continues to apply it where relevant to the 'interpretation, disapplication or quashing' of any law made before exit.[15] When interpreting retained EU-derived law, the courts are not bound to decisions of the Court of Justice of the European Union [CJEU] made after exit, nor can they refer any questions to the CJEU.[16] Domestic courts may, however, 'have regard' to the decisions of the CJEU or any other EU body in 'so far as it is relevant'. While the Supreme Court is not bound to retained EU case law, lower courts must treat EU case law as having equivalent status as those of Supreme Court decisions and must interpret it 'in accordance with retained case law and any retained general principles of EU law'.[17] General principles of EU law[18] are retained in domestic law (only if recognised by CJEU pre-exit case law) but given no right of action, nor is any court or tribunal permitted to disapply any rule of law or quash any conduct where they conflict with incorporated general principles of the EU.[19]

The Charter of Fundamental Rights is excluded from incorporation into domestic law,[20] though it 'does not affect the retention in domestic law … of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).' It was announced by the Department for Exiting the European Union [DExEU] that the 'intention of the EU (Withdrawal) Bill is that those rights will continue to be protected.'[21] The veracity of this statement will be questioned in this article

The most controversial aspect of the EUWA arises under Section 8 EUWA entitled 'dealing with deficiencies arising from withdrawal'. Ministers may by secondary legislation may any change to retained law 'as the Minister considers appropriate to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law' arising from withdrawal.[22] These changes, which are a matter of the subjective discretion of the Minister,[23] can be made to any law of any status – including primary legislation. The limitations on the use of this unprecedented scale and scope of delegated power are limited: Ministers may not impose or increase taxes, create a criminal offence, or law with retrospective

[12] Section 1 European Union (Withdrawal) Act 2018. This is defined in the Act as 11:00pm on 29 March 2019.
[13] Section 2 EUWA.
[14] Section 3 EUWA.
[15] Section 5(1)-(2) EUWA.
[16] The Article 267 TFEU preliminary reference procedure enables national courts to refer questions of the interpretation of the Treaties, or the validity and interpretation of any other EU law to the CJEU.
[17] Section 6(3) EUWA.
[18] General principles, including fundamental rights, legal certainty and proportionality, are key legal principles which were developed by the Court of Justice of the EU, and form part of the way in which the EU is governed. See Takis Tridimas, *General Principles of EU Law* (OUP 2007).
[19] Schedule 1(2) EUWA.
[20] Section 5(4) EUWA.
[21] Right by Right Analysis, para 25, 13.
[22] Section 9(1) EUWA.
[23] See J Grogan, 'The Lords have just raised the bar on the defence of rights and the rule of law in the Brexit process' LSE Brexit Blog 27 April 2018: http://blogs.lse.ac.uk/brexit/2018/04/27/the-lords-have-just-raised-the-bar-on-the-defence-of-rights-and-the-rule-of-law-in-the-brexit-process/.

application. They also may not amend, repeal or revoke the HRA or any legislation under it or amend the Northern Ireland Act 1998. A sunset clause of two years is included in this section – though, controversially this may be amended by the Minister, and addition discussion of extension of this clause in the event of no-deal is under discussion.[24]

The inherent danger of this Henry VIII[25] power to alter primary legislation through secondary acts, is the possibility that rights which the government have shown not to support could be in danger, as executive policy-making could be disguised as necessary reform of the law, passed with limited parliamentary checks. Limited oversight is envisioned under the bill, and even less is possible given the sheer scale and scope of changes to be made.[26] Delegating unprecedented scope of legislative power to the executive, the Act has been widely subject to criticism,[27] particularly concerning the impact on individual rights protection. This flagship Brexit legislation designed to deliver the legal separation of the UK from the EU, but also guarantee a degree of legal certainty through the Brexit Process. In effect, however, it compromises both to achieve neither. The design of the European Union (Withdrawal) Act 2018 has served to mark the entrenchment of a new vision of the division of powers. Critically, without a codified constitution or robust rights protections, the cumulative effect of the EUWA creates unprecedented risk to the future of rights protection.

C. Categorisation of Risk posed to Rights by Brexit Process

The UK's framework of rights protection is a multi-layered and multi-faceted tapestry of interwoven sources and principles, ranging from the common law, to the European Convention on Human Rights [ECHR] as incorporated by the HRA, to rights derived from the EU Treaties and Charter of Fundamental Rights. The degree of protection and range of remedies available to these rights varies according to their source. This article delineates the impact of the Brexit on human rights into four categories,[28] categorised by the degree of risk posed by the process of separation and legal reform:

(1) **Rights Lost**

This category includes those rights which are predicated on UK membership of the EU, and which cannot be replicated or restored in the UK;

(2) **Rights Critically at Risk**

This category includes rights which are capable of replication or restoration in the UK, but which are either predicated on agreement with the EU, or are otherwise critically at risk by legislative or executive action;

[24] Department for Exiting the European Union, 'White Paper on Legislating for the Withdrawal Agreement between the United Kingdom and the European Union' (24 July 2018) para 71-71.
[25] See UK Parliament Glossary 'Henry VIII Clauses': https://www.parliament.uk/site-information/glossary/henry-viii-clauses/.
[26] Conservative estimates are that between 800 and 1,000 changes will be needed: Department for Exiting the European Union, *The Repeal Bill: White Paper* (30 March 2017) para 3.19. See R Fox, 'Can the government get all its Brexit Statutory Instruments through Parliament by exit day on 29 March?' (Hansard Society Blog, 12 February 2019) https://www.hansardsociety.org.uk/blog/can-the-government-get-all-its-brexit-statutory-instruments-through.
[27] See Bingham Centre for the Rule of Law, 'Briefing Paper: Parliament and the Rule of Law in the Context of Brexit' (29 September 2016); House of Lords Select Committee on the Constitution, 'The 'Great Repeal Bill' and delegated powers' 9th Report of Session 2016-17 (7 March 2017) HL Paper 123; House of Lords Delegated Powers and Regulatory Reform Committee published its *European Union (Withdrawal) Bill: 3rd Report of Session 2017–19 (TSO, 2017), HL Paper 22, 28 September 2017*; and M Elliott and S Tierney, 'The 'Great Repeal Bill' and Delegated Powers', UK Const L Blog (7th Mar 2017).
[28] For an introductory outline of this taxonomy, see J Grogan, 'The Only Certainty is Uncertainty: Risk to Rights in the Brexit Process' in E Fahey and T Ahmed (eds), *Justice, Injustice and Brexit* (Edward Elgar Press) [*Forthcoming*].

(3) **Rights Vulnerable to Repeal**

This category of rights may owe their origin to the EU but can or do exist independent of its legal framework, but which nevertheless are vulnerable to reform or removal without underlying obligations to be protected under EU law;

(4) **Rights at Low Risk of Removal**

This final category of rights does not owe their origin or continued recognition to EU law but are recognised at common law or are otherwise at low risk.

This categorisation rejects arguments based on 'cross-matching' whereby a right sourced in one instrument is the same or equivalent to another.[29] The approach of this article is instead holistic: viewing substantive rights protection as a matrix of interrelated *inter alia* rules, obligations, remedies which are supported by a wider multi-level institutional framework. By establishing the risk created by the *process* of exit, it identifies the structural and procedural weaknesses created in the system – rather than the lack of recognition of a right *per se*.

2. RIGHTS LOST

A. Rights of EU Citizenship Lost

An inevitable consequence of EU withdrawal is the loss of EU citizenship by British nationals with no other claim on EU-27 citizenship.[30] UK nationals will also lose a host of rights which cannot be replicated including rights to participate in the democracy of the EU, with the right to vote and stand in European Parliament elections (Article 39 EUCFR); and the right to vote and stand in municipal elections in Member States where the EU citizen is a resident (Article 40 EUCFR). Justiciable rights to good governance, including the right to good administration by Union institutions (Article 41 EUCFR); the right of access to documents (Article 42 EUCFR) and to the European Ombudsman (Article 43 EUCFR); as well as the right to petition the European Parliament (Article 44 EUCFR, Article 227 TFEU).

Crucially, UK citizens will lose free movement rights which them and their families to move and reside freely within the EU subject to conditions laid down in the Treaties.[31] In outlining its intentions for the future relationship with the EU, the Government stated that any future mobility arrangements 'will be consistent with the ending of free movement, respecting the UK's control of its borders and the Government's objective to control and reduce net migration.'[32] EU citizens without any other claim will lose their rights to enter, work and reside in the UK following withdrawal.

B. Removal of Oversight and Complaint Mechanisms

Under the current framework, individuals can make a formal complaint against a member state for violation of EU obligations to the Commission. Where this is upheld, the Commission can request that the member state

[29] Notably, this methodology was adopted by the Department for Exiting the European Union (n 6), its deficiencies are examined in 3(B).
[30] I distinguish here between the total loss of EU citizenship by UK nationals by virtue of UK withdrawal, and the potential loss of acquired rights by EU-27 and UK citizens who have exercised Treaty rights to reside in the UK and EU-27 respectively, and who are the subjects of the Withdrawal Agreement. This is discussed infra 3(A).
[31] Article 45 TFEU.
[32] HM Government 'The Future Relationship Between the United Kingdom and the European Union' CM 9593 (July 2018).

respects its obligations or bring the complaint to the Court of Justice for violation of EU law. Oversight by the Court of Justice of the European Union [CJEU] has played an important role in the development of rights jurisprudence in the UK. For example, where UK courts have referred questions to the CJEU for preliminary references under Article 267 TFEU, this has resulted in the removal of compensation caps for discrimination claims;[33] included transgender people under the scope of discrimination law;[34] and introduced the concept of discrimination by association.[35] European Commission intervention led to the reform of the law on equal pay to remove gender discrimination.[36] The idea of external oversight of EU Institutions, particularly the CJEU, was argued in the Brexit referendum campaign to be anathema to national sovereignty, and it was an objective of Brexit supporters to end the CJEU's jurisdiction within the UK.[37] If the Withdrawal Agreement is ratified, the CJEU will have limited oversight in certain matters (eg citizens' rights),[38] but such oversight will be lost in any other areas concerning rights, obliging claimants to rely on the common law and ECHR rights.

Rights which depend on cooperation between the legal systems of the remaining Member States and the UK will also be lost with the rejection of CJEU judicial oversight, including those which arise from mutual recognition of civil judgments.[39] For example, Brussels II Revised Regulation concerns the right of residence of a child which could not be then enforced outside of the UK without reciprocal arrangements with the EU-27. Related to this is the loss of the *institutional* framework which underpins and supports the ordinary work of rights protection within the EU and domestic legal systems: this includes the work of the Fundamental Rights Agency,[40] and the European Ombudsman,[41] which have provided both information and guidance, but also reporting and 'soft pressure' measures supporting on the protection of rights at national and European levels.[42]

C. Loss of Effective Remedies for Rights Infringement

Membership of the EU and the EU Charter has played a significant role in the protection and development of rights jurisprudence in the UK.[43] Nowhere is this clearer than in the effectiveness of remedy for rights

[33] C-271/91 Ma*rshall v Southampton and South West Hampshire AHA (No 2)* [1993] IRLR 445.
[34] C-13/94 *P v S and Cornwall County Council* [1996] ICR 795.
[35] C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603.
[36] Case C-61/81 C*ommission of the European Communities v United Kingdom* [1982] ICR 578.
[37] See eg Vote Leave, 'Briefing: Taking back control from Brussels', at www.voteleavetakecontrol.org/briefing_control.html; Michael Howard and Richard Aikens, 'The EU's Court is picking apart our laws' (*The Telegraph* 22 June 2016); and Liz Bates, 'Top Tories urge Theresa May to end supremacy of European Court of Justice' (*Politics Home* 3 December 2017).
[38] See Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (19 March 2018) TF50 (2018) 35 – Commission to EU27: https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en.
[39] See M Kilinsky, 'Mutual Trust and Cross-border Enforcement of Judgments in Civil Matters in the EU' (2017) 64 Netherlands Intl LR 115; and U Grusic, 'Recognition and Enforcement of Judgments in Employment Matters in EU Private International Law' (2016) 12 J Private Intl L 521.
[40] The Fundamental Rights Agency is an EU agency which provides fundamental rights expertise to institutions of the EU and Member States: see www.fra.europa.eu.
[41] The European Ombudsman is an independent body tasked with holding EU institutions to account, in addition to promoting the principle of good administration.
[42] For reports on the work of the Fundamental Rights Agency in the UK, see: <https://fra.europa.eu/en/country-eu/united-kingdom>.
[43] See eg *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603 (HL) 658–59; *Thoburn v Sunderland City Council* [2002] EWHC 195, [2003] QB 151; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324; *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, [80].

infringement. The EU legal system has long recognised the principle of effectiveness,[44] or the requirement that domestic rules must not be 'liable to render practically impossible or excessively difficult' the exercise of rights which have been conferred by EU law.[45] A right which provides a weak or little remedy provides little incentive to respect rights from a legislative or administrative standpoint, which weakens protection for individuals.[46] If a provision of national law (of any value) which fall within the scope of EU law[47] infringes a fundamental right under the EU Charter or a general principle of EU law, the measure must be disapplied by national courts under the principle of the supremacy of EU law.[48] The supremacy of EU law was a core aspect of the anti-EU campaign which argued that the principle violated national sovereignty and British democracy.[49] However, government concern with regard to (EU-)rights has primarily related to the perception that they provide 'protection for people who have no right to be protected'[50] to bring challenges against government or strike down domestic legislation.

Antipathy towards any limitation of executive action based on rights grounds is reflected in the systematic removal of accountability mechanisms which *could be replicated* by the EUWA. The right in *Francovich* for damage done by a State acting within scope of EU law and in breach of Treaty rights is removed by the EUWA.[51] Its removal weakens both an avenue for remedy and also a powerful preventive mechanism (though, it must be acknowledged, that the high bar for establishing a 'sufficiently serious' breach has rendered state liability pursued through private action as more in principle than in practice).[52] Similarly, while general principles which have been recognised by the CJEU prior to exit will be incorporated by the EUWA,[53] their relevance will be limited to interpretation of retained law.[54] There will be no right of action based on a failure to comply with general principle, and domestic courts will not be permitted to quash any conduct or disapply any provision on the basis that it is incompatible with a general principle.[55]

Article 47 EUCFR provides the right to an effective remedy and has strengthened access to justice rights. It is not limited to the determination of a person's civil rights and obligations, or criminal charges as Article 6 ECHR is.[56] This is in stark contrast to the HRA 1998 which does not incorporate Article 13 ECHR requiring an effective remedy before a national authority. The remedies under the ECHR are not equivalent to those under EU Law. Under the HRA, it is unlawful for a public authority to act in a manner contrary to the

[44] See F Synder, 'The Effectiveness of European Community law' [1993] MLR 56; and M Accetto and S Zlepting, 'The Principle of Effectiveness: Rethinking its role in Community Law' [2005] Euro Pub L 375.
[45] Case C-268/06 *Impact v Minister for Agriculture and Food* [2008] ECR I-2483, para 46.
[46] W Hohfeld, *Fundamental Legal Conceptions* (Yale University Press 1946).
[47] Article 51 EU Charter of Fundamental Rights. See also Groussot, Xavier and Pech, Laurent and Petursson, Gunnar Thor, 'The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication' (July 1, 2011): https://ssrn.com/abstract=1936473.
[48] In *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs: Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62, the Court of Appeal held that the embassies of Sudan and Libya could not rely on the State Immunity Act 1978 to bar employment rights claims under the EU Working Time Directive, as it would violate Article 47 CFR which in turn required the disapplication of the Act. The Court also found a violation under Article 6 ECHR and issued a declaration of incompatibility. See A Young, '*Benkharbouche* and the Future of Disapplication' (UK Constitutional Law Blog 24 October 2017).
[49] For academic arguments concerning the question of parliamentary sovereignty and EU membership, see Mark Elliott 'Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' [2014] Eur Const LR 379; and Alison Young (ed), 'Sovereignty and the Law: Domestic, European and International Law Perspectives' (OUP 2013).
[50] Sir Bill Cash MP as reported by Gordon Rayner 'Britain takes back the right to deport as Britain repeals powers from the EU' (*The Telegraph* 30 March 2017).
[51] Schedule 1, Part 4 EUWA.
[52] See Tobias Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after Francovich' (2012) 49 CML Rev 1675.
[53] Schedule 1, Part 2 EUWA.
[54] Tobias Lock, 'Human rights law in the UK after Brexit' [2017] PL 117.
[55] Schedule 1, Part 3.
[56] For example, immigration proceedings: *ZZ (France) v Secretary of State for the Home Department* [2014] EWCA Civ 7, [2014] QB 820. See Nik de Boer, 'Secret evidence and due process rights under EU law' (2014) 51 CML Rev 1235, 1256–1261.

Convention, and any such unlawful action can be quashed.[57] The HRA also contains an interpretative requirement, in that domestic courts are directed to give effect to legislation in a manner compatible 'in so far as is possible' to Convention rights.[58] While the Courts may issue a declaration of incompatibility where it not possible to interpret primary legislation in a manner which does not violate a right under the HRA. Similarly, while access to justice has been a principle of the common law, it has not provided equivalent protection, and has only served in case law as a principle of interpretation preventing the 'disproportionate erosions of access to justice'.[59]

Refuting the arguments that rights will be weakened, DExEU in the *Right by Right Analysis* argued that remedies for rights will not be impacted by the Brexit process, demonstrated by the remedy available under the HRA. Curiously, the example given, *Benkharbouche*, epitomises the weaker effect of the HRA when compared with the stronger remedy available under the EU Charter. [60] The UK Supreme Court recognised that both the right to access a court (Article 6 ECHR) and the right to a fair trial and effective remedy (Art. 47 CFR) had been violated.[61] As there was a conflict between domestic law and EU law (Article 47 EUCFR) the domestic law was disapplied, whereas the remedy for an unavoidable violation of the ECHR, resulted in a only in a declaration of incompatibility to Parliament. The irony of citing *Benkharbouche* is that the decision in this case could not have been made following Brexit.[62] Cumulatively, the obligations and remedies available under the HRA 1998 are not equivalent to directly effective rights, and critically the effective remedies which arise from the EU law which will be lost during the Brexit process.

3. RIGHTS CRITICALLY AT RISK

A. EU Citizens who have exercised their Treaty Rights to become resident in the UK

EU citizens in the UK face critical uncertainty as to their future during and after the Brexit process, as the protection of their rights became a 'matter for negotiation' from both the perspective of internal dynamics of legislating for (or against) rights protection, or as part of the withdrawal agreement and the future relationship with the EU.[63] The Joint Committee on Human Rights condemned the use of individuals' fundamental rights as 'bargaining chips'.[64] Their report argued that there would still be recourse to protection under Article 8 ECHR, but warned against the practical difficulties of overwhelming the courts in the deluge of individual cases, as well as the practical impossibility of mass deportation.[65]

Since the 2016 report, there has been little certainty and less clarity. The assumption that EU citizens' rights (and UK citizens resident in the EU-27) would be recognised by the Withdrawal Agreement and the Withdrawal Agreement (Implementation) Bill have been cast into doubt with the lack of certainty regarding

[57] Section 6, HRA 1998.
[58] Section 3, HRA 1998.
[59] Sandra Fredman, Alison Young, and Meghan Campbell, 'The Continuing Impact of Brexit on Equality Rights' (Oxford Human Rights Hub and The UK in a Changing Europe, 2018) available at: https://ukandeu.ac.uk/research-papers/the-continuing-impact-of-brexit-on-equality-the-findings/.
[60] DExEU, *Right by Right Analysis* (n 6) 12-13.
[61] *Benkharbouche v Secretary of State for Foreign & Commonwealth Affairs; Libya v Janah* [2017] UKSC 62, [78]
[62] Alison Young, '*Benkharbouche* and the Future of Disapplication', U.K. Const. L. Blog (24th Oct. 2017): https://ukconstitutionallaw.org/.
[63] See House of Commons Exiting the EU Committee, The Government's Negotiating Objectives: the Rights of UK and EU citizens; and cf P Daly, K Hughes and K Armstrong, 'Brexit and EU Nationals: Options for Implementation in UK Law' CEPS/CPL Working Paper Nov 2017 1-14.
[64] Joint Committee on Human Rights, 'The Human Rights Implications of Brexit' Fifth Session Report of 2016-2017 HL Paper 88, HC 695 (19 December 2016). See Ruzi Ziegler, 'Logically Flawed, morally indefensible: EU Citizens in the UK are bargaining chips' (LSE Brexit Blog 16 February 2017.
33-34.
[65] ibid 13-18.

its future. Attempts to otherwise legislate for the rights of EU citizens resident in the UK prior to withdrawal have been unsuccessful: a House of Lords amendment on EU citizens' rights to the Bill to Trigger Article 50 was rejected by the House of Commons, and while under the EUWA, it initially appeared that EU citizens' rights which existed before exit would be incorporated into the law, this has been cast into doubt by the Immigration and Social Security Co-ordination bill as introduced which aims to end free movement, without any provision for resident EU citizens and their families.

Currently, recognition of EU citizens' rights is in secondary legislation: the UK government amended the Immigration Rules to implement a registration scheme giving 'settled status' to EU citizens who have been resident for five years, and 'pre-settled' status to those who have not. This status is constitutive, meaning that EU citizens must apply for it and failure to do so within the proscribed time limit will result in the loss of a claim to it.[66] There is currently no provision for appeal in the event of a rejected application.[67] The rights of carers, family members, and vulnerable groups (including children and adults in care, and the elderly) have not been sufficiently clarified,[68] and latent threats of exposure to the 'hostile environment' remain.[69] Protection given by the Withdrawal Agreement (if it is ratified) is limited due to the difficulty of enforcing international agreements as an individual. But without even quasi-entrenchment of these rights through ratification of the Withdrawal Agreement (which is otherwise constitutionally challenging under the domestic law),[70] the rights and future of EU citizens in the UK remains at risk as they are vulnerable to changes in immigration policy by government.[71]

B. Contradiction in the 'Equivalence of Rights'

The EU Charter codifies fundamental rights, including first-generation rights of life[72] liberty,[73] and the prohibition on torture[74] and the death penalty,[75] as well as socio-economic rights, and third-generation rights such as the protection of personal data.[76] The primary justification offered for the removal of the Charter is that it is not a source of rights, but rather it only 'reaffirmed the existing legally binding fundamental rights, in a new and binding document'.[77] This is a non-sequitur. If it were true that the Charter serves *only* to codify rights which are already binding on actions which fall within its scope, then this would be a *reason* to incorporate the Charter.[78] The UK would benefit from such codification as an easy, and accessible source of rights, listed and clarified, for the interpretation and application of retained law. There could be no arguments

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[66] Home Office, *EU Settlement Scheme: Statement of Intent,* 21 June 2018. For the website, see <https://www.gov.uk/settled-status-eu-citizens-families>. See Stijn Smismans, 'EU Citizens' Rights post Brexit: why direct effect beyond the EU is not enough' [2018] Eur Const LR 443.

[67] The Statement of Intent clarifies only that an Independent Authority and the right of appeal must be set out in primary legislation (ibid 1.9). See Smismans (n75) 450. The critical risk is rendered acute by the exemption for immigration proceedings under the Data Protection Act 2018, see infra Section 4(B).

[68] Smismans (n75).

[69] Ibid. See also Thomas Colson, 'EU citizens could be the next victims of Theresa May's 'Hostile' Immigration policy' *Business Insider* 24 April 2018, available at http://uk.businessinsider.com/eu-citizens-theresa-may-hostile-environment-immigration-brexit-2018-4?r=US&IR=T.

[70] Daly et al, 'Brexit and EU Nationals: Options for Implementation in UK Law' (n 63).

[71] Steve Peers, 'What's next for acquired rights of EU27 and UK citizens?' EU Legal Analysis Blog 6 February 2018; available at http://eulawanalysis.blogspot.com/2018/02/whats-next-for-acquired-rights-of-eu27.html

[72] Article 2 EUCFR.

[73] Article 6 EUCFR.

[74] Article 4 EUCFR.

[75] Article 2 EUCFR.

[76] Article 8 EUCFR.

[77] DExEU, 'Charter of Fundamental Rights of the EU: Right by Right Analysis' (5/12/2017)

[78] J Grogan, 'The good, the bad and the ugly arguments for ditching the EU Charter of Fundamental Rights' (LSE Brexit Blog, 1 February 2018): https://blogs.lse.ac.uk/brexit/2018/02/01/the-good-the-bad-and-the-ugly-arguments-for-ditching-the-eu-charter-of-fundamental-rights/.

as to whether a right did or did not exist (as will likely arise in future litigation). However, the inverse is argued: the Charter is not relevant as it merely restates rights sourced elsewhere. It has been asserted that the excision of the EU Charter will not undermine 'substantive rights' which otherwise have existed and exist elsewhere in EU law, and thus will be converted into UK law.[79] The EUWA references these as 'underlying rights' which will be relevant to the interpretation by the UK Courts, even when interpreting references to the Charter in converted case law. A point weakened by the lack of conclusive identification of 'directly effective' Treaty provisions, or guidance by the EUWA as to the identification of these rights.

The confusion of what constitutes an 'underlying right' when the codified account has been removed creates significant legal certainty and undermines codified rights which do not exist at common law or in other rights instruments.[80] Where the contention that the Brexit process will not undermine substantive rights protection was repeatedly challenged, notably by the House of Lords EU Committee,[81] DExEU, arguing that an equivalence of rights is found elsewhere,[82] asserted that rights contained within the Charter will continue to be afforded protection through converted EU law; the ECHR[83] or International Rights Instruments; and the common law[84] or domestic legislation. Each of these statements are either untrue or misleading.

DExEU's analysis stated that 18 Charter rights 'correspond, entirely or largely, to articles' of the ECHR and are 'as a result, protected both internationally and, through the Human Rights Act 1998 and devolution statutes'. Such an assertion obfuscates the multiplicity of sources of rights reflected in the Charter, and the irony that the rationale for codification in the Charter was exactly to provide a single, clear source of rights to avoid reference to a plethora of sources. Similarly, a right being 'largely' the same as listed in another instrument is misleading, omitting the weaker remedies and challenge of establishing standing[85] under other instruments,[86] as evidenced by recent case law showing the relative importance of the EU Charter in *BAT Industries*,[87] *AZ*,[88] and in the seminal *Benkharbouche*.[89]

Curiously, DEXEU also forwarded the argument that Charter rights, where not found in common law or ECHR, could be covered by international treaties, overlooking the fact that international treaties (other than the EU Treaties) may not confer enforceable rights upon individuals where they have not been incorporated into domestic law. Some instruments identified as sources of Charter Rights have not been signed or ratified by the UK: for example, the Council of Europe Convention on Human Rights and Biomedicine. Where there has been incorporation (eg the Statute of the International Criminal Court)[90] this incorporation does not confer enforceable rights on the individual, but rather only criminalises conduct. Other important international rights treaties have not been incorporated at all: for example, the Universal Declaration of Human Rights 1948[91] is

[79] ibid.
[80] See Merris Amos 'Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill' (UK Constitutional Law Association) available at https://ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/.
[81] Select Committee on the Constitution of the House of Lords: 'The 'Great Repeal Bill' and Delegated Powers' 9th Report of Session 2016-2017 HL Paper 123.
[82] DExEU, 'Charter of Fundamental Rights of the EU: Right by Right Analysis' (n 6).
[83] See infra 4(C).
[84] See infra 5.
[85] See eg 'victimhood' under Article 34 ECHR; *Mamatkulov and Askarov v Turkey* [GC], 1§§ 100 and 122; *Loizidou v. Turkey* (preliminary objections), §70; *Vallianatos and Others v Greece* [GC], § 47)
[86] See supra 2(C).
[87] [2017] UKFTT 558 (TC), wherein the First Tier Tribunal held that the claimants' right to effectiveness under Article 47 EUCFR, in addition general principles of legal certainty and legitimate expectation, whereas Article 6 ECHR right to fair hearing was not as it did not apply to tax disputes.
[88] [2017] EWCA Civ 35, wherein the Court of Appeal held that Article 47 EUCFR applied to immigration decisions, whereas Article 6 ECHR did not.
[89] [2017] UKSC 62. See *supra* Section 2C for discussion.
[90] International Criminal Court Act 2001.
[91] Acknowledged as the source for the Right to Human Dignity (Article 1 EUCFR). See also C. Dupré, 'Human Dignity is Inviolable. It Must be Respected and Protected: Retaining the EU Charter of Fundamental Rights After Brexit' (2018) EHRLR 101.

not legally binding and cannot be relied upon in proceedings; and the Refugee Convention has not been incorporated.[92] It is disingenuous to argue that rights sourced in international treaties guarantee the same level of protection as currently guaranteed by the EU Charter. The only certainty in this, is that where the EU Charter is lost, rights recognised within it which are *not* either easily identifiable or recognised elsewhere in EU or UK case law, or the ECHR are critically at risk.

C. The Good Argument for the Removal of the EU Charter (and why it's wrong)

The EU Charter has become the primary source of fundamental rights in the EU.[93] The good argument for the removal of the Charter in the EUWA is that the Charter is designed to operate *only* within the scope of EU law, therefore it will have no relevance after withdrawal from the EU, as the UK will no longer operate within that scope of authority. The best form of this argument is that the EU Charter can *only* make sense in the context of EU membership, as 'the Charter, the principles it contains, and the evolution of its meaning and interpretation are all tied to membership of the EU.'[94] This knotted relationship encompasses both the driving political philosophy of embracing rights as a fundamental value of the EU, but also the legal practicalities of CJEU judgments, and the collective constitutional narrative which serves as a source of recognition and scope of these rights.[95]

Once the Charter (or reference to the Charter) is 'unmoored' from EU membership and the jurisprudence of the CJEU, it would be 'impossible to predict its likely direction of travel within domestic law.'[96] Where the Charter does not have an anchor in the membership, institutions and acquis of the EU, it loses its relevance. There are two responses: (1) the Charter will continue to have relevance to retained EU law, *particularly* where retained EU law, or pre-Brexit UK and CJEU case law, contains explicit reference to Charter rights. Such continuing relevance of the Charter to the interpretation of retained law is recognised by the EUWA which states that the removal of the Charter 'does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles)'.[97] The complication this clause aims to resolve leads to the second response to the argument: explicitly excluding the Charter in the interpretation of retained law, and in litigation concerning former Charter rights, will cause significant confusion and uncertainty in practice as Courts and litigants must rely on the ambiguous authority of 'underlying' rights to be found in a multiplicity of sources. This confusion will be compounded by distinctions arising from interpretive obligations owed to retained law, and new law introduced to replace it either through primary legislation (eg the envisioned Agriculture, and Customs Bills)[98] or through delegated powers under the EUWA, the latter of which will not be subject to interpretation based on 'underlying rights'.[99]

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[92] Article 18 EUCFR provides for the right to asylum. The UK opted out of the right to asylum under Article 78 TFEU, and due to Article 21 of Protocol 21 of the Treaties, Article 78 TFEU is not binding on the UK.
[93] Article 6 TEU states three formal sources for human rights in the EU: the EU Charter, general principles of EU law, and the European Convention of Human Rights as a 'source of special significance'. Since 2009, the Court of Justice of the EU has placed primary importance on the EU Charter as the principal basis for the assessment of human rights compliance.
[94] Mark Elliott, Stephen Tierney and Alison Young, 'Human Rights Post-Brexit: The Need for Legislation?' *Public Law for Everyone* 8 February 2018, available at https://publiclawforeveryone.com/2018/02/08/human-rights-post-brexit-the-need-for-legislation/.
[95] S Morano-Foadi and L Vickers (eds) *Fundamental Rights in the EU* (Hart 2015).
[96] Elliott et al (n 94).
[97] Section 5(5) EUWA.
[98] See the Queens Speech to Parliament 2017 https://www.gov.uk/government/speeches/queens-speech-2017.
[99] See Amos (n 80).

4. RIGHTS VULNERABLE TO REPEAL

A. Weakening the Foundation of Equality, Worker and Consumer Rights

In the absence of codified constitution, provisions of primary EU law, the EU Charter of Fundamental Rights and directly effective rights within the EU Treaties, have held quasi-constitutional status capable of disapplying national norms of any status including Acts of Parliament. Even in the absence of implementing legislation, directly effective rights including non-discrimination on grounds of nationality,[100] equal treatment,[101] and equal pay[102] can be enforced in domestic courts.[103] As consumers and workers are at the core of the functioning of the Single Market, associated regulation inevitably came within the scope of EU law.[104] While there is still a question of the UK's future relationship with the Single Market, consumer and workers' rights do not necessarily depend on it to exist. As identified by the High Court in *Miller*, rights including employment protection (in the Working Time Directive), equal treatment and the protection of EU competition law as well as the rights of non-residents to enjoy the benefit of four freedoms within the UK could be replicated without EU membership.

While the Equality Act 2010 is not dependent on the ECA (and in many cases the legislation has gone beyond the requirements of EU law), equality law is indebted to the EU.[105] Women's groups have commented on the benefit brought by EU membership to the position of women's rights, particularly with regard to sex discrimination, maternity,[106] parenthood,[107] and the right to equal pay for equal work: for example, the Commission's infringement action against the UK on the matter of legislating for unequal pay.[108] Equally, in *Walker*[109] the Supreme Court held that the Equality Act 2010 is incompatible with EU law and must be disapplied, and that Mr Walker's husband is entitled on his death to a spouse's pension, provided they remain married.

This body of rights will not be lost or removed with Brexit. The transformation wrought by Brexit will be at once subtle, and more deceptively benign. The vulnerability of rights within this category lies in the fact that their continued existence is subject to the political will to protect them, as there may be no further EU obligation to recognise them. While the HRA is immune from amendment by Henry VIII powers under the EUWA, no such immunity is given to the Equality Act 2010.[110] Ministers could, through secondary legislation, modify or remove exceptions given under the Equality Act 2010[111] and justifications for discrimination[112] could be

[100] Article 18 TFEU.
[101] Article 19 TFEU, which prohibits discrimination to sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation beyond employment to good, services, housing, education and social protection: all currently implemented through the Equality Act 2010. See Nicole Busby, 'Equality law, Brexit and devolution' [2017] Emp L B 4.
[102] Article 157 TFEU.
[103] For analysis, see Colm O'Cinneide, The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC (Brussels, Belgium: Migration Policy Group, 2012).
[104] See Iris Benohr, *EU Consumer Law and Human Rights* (2013 OUP) ch 2; and A Bogg, C Costello, ACL Davies, J Prassl, *The Autonomy of Labour Law* (2015 Hart Publishing) ch 9.
[105] Busby (n 101).
[106] See eg Pregnant Workers Directive (92/85/EEC).
[107] Parental Leave Directive (2010/18/EU).
[108] See Case C-61/81 *Commission of the European Communities v United Kingdom* [1982] ICR 578.
[109] *Walker v Innospec and others* [2017] UKSC 47.
[110] Fredman et al (n 59). Amendments to prevent change to the Equality Act 2010 and consumer rights were proposed at committee stage but failed to pass: see <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/amend/euwithdrawal_rm_cwh_1011.50-56.html>
[111] Sections 191-197 Equality Act 2010.
[112] Sections 13(2), 15, 19(2)(d).

extended.[113] Even where there is no express intention to reduce or weaken equality law, without the external obligation of EU law, equality law is made 'vulnerable to change and neglect.'[114]

Consumer and workers' rights are in a similar position as equality law, having been driven by the exigencies of the Internal Market, and extended by the EU beyond the bare minimum of safety standards. A host of directives implemented in the UK have extended the protection of workers,[115] to those working on part-time, temporary and fixed term contracts.[116] Like the Equality Act 2010, the Consumer Rights Act 2015 can trace its origin to EU legal obligations. Theresa May has spoken of the continued guarantee of workers' rights,[117] and agreed political intentions on future relationship with the EU include mutual obligations to 'commit to the non-regression of labour standards' and also to 'maintain reciprocal high levels of consumer protection'.[118] However, concerns remain that in the absence of external obligations, consumer and labour rights would continue post-Brexit until it became politically expedient for them not to, for example, as a condition of any future trade deal.[119]

International agreements do not enjoy the same level of parliamentary scrutiny over negotiation and ratification than there is or EU legislation.[120] Scrutiny over external agreements is also tied with comparative negotiating power. In its external action, the EU has emphasised the promotion of its core values – human rights, democracy and the rule of law,[121] in addition to the promotion of trade and development with the EU. Concerns have been voiced that in the (re)negotiation of trade deals with over 65 countries, the UK government may aim to balance a weaker negotiating position (a smaller market, and time and resource pressure) with a reduction in labour standards (including maternity, parental leave, equal pay, working-time and agency worker rights) in order to improve competitiveness in the international market.[122] Without sufficient domestic protection, for example in the requirement of a clause protecting labour rights in trade agreements, these rights are at increased vulnerability through the Brexit process.

B. Vulnerability of 'New' Rights

[113] Busby (n 101).
[114] ibid.
[115] EU Directive 2000/78/EC (the Framework Directive) requires member states to prohibit discrimination, including on grounds of sexual orientation, in the field of employment.
[116] Part-time Workers Directive (97/81/EC); Fixed-Term Workers Directive (99/70/EC); Temporary Agency Workers Directive (208/104/EC)
[117] Ann Pettifor 'May's Promise on Workers' Rights is Hollow if She Doesn't Get a Good Deal' (The Guardian 17 January 2017).
[118] HM Government 'The Future Relationship Between the United Kingdom and the European Union' CM 9593 (July 2018) at 123.
[119] See James Harrison, 'Workers' rights are now a basic element of trade deals. What stance will Britain take?' LSE Brexit Blog (27 June 2017); and Adam Bienkov, 'Theresa May's new Brexit chief called to turn 'back the clock' on workers' rights' Business Insider (16 July 2018). See also Michael Ford 'The Impact of Brexit on UK Labour Law' (2016) IJCLLIR 32; and James Harrison et al, 'Taking Labour Rights Seriously in Post-Brexit UK Trade Agreements: Protect, Promote, Empower', CSGR Working Paper No. 274/17, Centre for the Study of Globalisation and Regionalisation, University of Warwick 2017.
[120] Fredman et al (n 59).
[121] Laurent Pech, 'The Rule of Law as a Guiding Principle of the European Union's External Action' CLEER Working Paper 2012/3; and Gráinne de Búrca, 'Europe's Raison D'Etre' in Dimitry Kochenov and Fabian Amtenbrink (eds), The European Union's shaping of the International Legal Order (CUP 2013).
[122] See Women's Budget Group and Fawcett Society Report, 'Exploring the Economic Impact of Brexit on Women' March 2018 Report available at https://www.edf.org.uk/womens-budget-group-and-fawcett-society-report-exploring-the-economic-impact-of-brexit-on-women/; Harrison et al (n 119); and Gregor Irwin, 'British Trade Policy after Brexit: Ruthless Prioritisation Required' (Centre for Economic Policy Research 2016).

Reviling the EU Charter as containing 'flabby Euro-rights', Under-Secretary of State for Exiting the EU Suella Fernandes argued for the 'tried and tested' ECHR which enshrines 'basic, fundamental' rights.[123] The EU Charter is a source of rights, and (importantly) a source of additional rights which are not recognised in the ECHR or in the common law. There is nothing particularly Euro-centric about these rights, and EU citizenship is not one of the conditions of their applicability. It is unsurprising that rights have developed as times have changed: before the internet, and the capacity for mass collection of personal and sensitive data, there was no need to recognise a right to data protection.[124] The prohibition on human cloning was not necessary before it was possible to do so.[125] These so-called third-generation rights are vulnerable where there is a regressive attitude towards them, or where they are considered second- (or third-)order to other concerns, notably, national security and immigration policy.

Such differences in UK and EU attitudes are demonstrated by data protection rights. The CJEU has developed rights to privacy and data protection beyond standards set by the jurisprudence of the ECtHR, as in *Digital Rights Ireland*.[126] The recognition of the right to be forgotten in *Google Spain*[127] based on the extension of Articles 7 and 8 EU Charter, and it is unique to EU law, not being found in another rights instrument. In terms of the future vulnerability of these rights, the UK has already shown reticence towards the right to data protection as regards data retention. The Data Retention and Investigatory Powers Act 2014 and the Investigatory Powers Act 2016 (nicknamed the Snoopers' Charter) have shown a 'legal and political blind eye'[128] to the wide powers of data retention and interception without requisite safeguarding of individual rights. The Data Protection Act 2018 [DPA], ostensibly implementing the EU's General Data Protection Regulation, removes the rights of person subject to immigration procedures to have access to the data held about them.[129] By doing so, the DPA makes individuals unable to correct or delete any incorrect or unlawfully obtained information about them, creating Kafkaesque situation whereby individuals could be condemned in both innocence and ignorance which could disproportionately affect the fundamental rights of non-UK citizens.[130]

It is likely that the future of data protection will be determined by future agreement with the EU,[131] which has shown a strict standard for compliance both within,[132] and outside[133] of its borders with regard to the processing of data of EU citizens. Compliance with a standard of 'essential equivalence' with EU data protection could be a condition for participation in the single market, and lowering standards of data protection would jeopardise access to cross-border transfers.[134] However, this protection may not extend to other 'new' rights which are not necessary for a transactions with the Single Market, and protections for UK citizens or non-EU citizens interacting with state bodies may not fall within the scope of protection.

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[123] Suella Fernandes and John Penrose, 'Sucking up flabby Euro-rights law is not the point of Brexit independence' The Telegraph 18 November 2017.
[124] Article 8 EUCFR.
[125] Article 3 EUCFR.
[126] Case C-293/12 *Digital Rights Ireland v Ireland* [2014] ECR 238.
[127] C-131/12 *Google Spain SL v Agencia Espanola de Proteccion de Datos* (AEPD) [2014] ECR 317; [2014] QB 1022.
[128] C Kuner, D Jerker, B Svantesson, FH Cate, O Lynskey and C Millard, 'Editorial: The Global Data Protection Implications of 'Brexit' (2016) Intl Data Privacy L 167.
[129] Schedule 2, Part 1 Data Protection Act 2018.
[130] Claude Moraes, 'New UK data protection rules are a cynical attack on immigrants' The Guardian 5 February 2018.
[131] The Outline of the political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, as agreed at negotiators' level on 14 November 2018: see <https://ec.europa.eu/commission/publications/outline-political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom-great-britain-and-northern-ireland-agreed-negotiators-level-14-november-2018_en>
[132] Case C-293/12 *Digital Rights Ireland*.
[133] EU-US Transfer of Data C-362/14 *Schrems II*.
[134] See A Dickson, 'UK ministers warned of 'significant legal costs' if no Brexit deal on data' *Politico* (16 October 2018).

C. The European Convention on Human Rights

The ECHR is not an EU instrument and should ostensibly be unaffected by the Brexit process. Nevertheless, the HRA, which incorporates the ECHR into domestic law, was explicitly excluded from amendment, repeal or revocation by powers delegated under the EUWA.[135] The future of the ECHR is not, however, guaranteed and has been made vulnerable by the Brexit process. Once the UK withdraws from the EU, there will be no implicit requirement to be part of the ECHR. While there is no express requirement as part of Article 49 TEU which governs EU accession, in practice the European Commission has regularly assessed compliance with the ECHR as part of commitment to Article 2 TEU values,[136] implying a clear expectation that Member States are part of the Council of Europe and compliant with ECHR standards.[137]

The Conservative government's stated intention is to withdraw from the ECHR and repeal the HRA.[138] The Prime Minister, who has long held a stance against the ECHR,[139] stated in 2016 that the UK should leave the ECHR regardless of the EU referendum result.[140] In the face of widespread criticism, particularly from the perspective of the Northern Ireland peace process in which the ECHR plays a key role,[141] the Prime Minister has since oscillated between rejection[142] and commitment[143] to the ECHR.[144] This has been an concern for the EU, particularly where it impacts on security cooperation.[145] The draft Outline on the Future Relationship between the UK and EU includes a 'reaffirmation' of the UK's commitment to the ECHR (and the EU and Members States to the EU Charter) as a basis for cooperation.[146] However, in the shadow of the long-held antipathy, the HRA and continued role for the ECHR are vulnerable. Political commitments are not legally binding, and the HRA could be repealed – even where the UK remains part of the ECHR.

5. RIGHTS AT LOW RISK OF REMOVAL

The least vulnerable category of rights during the Brexit process are those rights which can claim a long legacy, firmly rooted in the British constitution and that are recognised at, and rooted in, the common law. These rights include personal security, personal liberty and private property, and can trace their origin back centuries within

[135] Section 8(7)(f) EUWA 2018.
[136] For example, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'EU Enlargement Strategy', COM(2015) 611 final.
[137] See Lock, 'Human rights law in the UK after Brexit' (n 54); and Tobias Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' (2010) 35 EL Rev 777.
[138] Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws' (Conservative Party, 2014). See S Greer and R Slowe, 'The Conservatives' proposals for a British Bill of Rights: mired in muddle, misconception and misrepresentation?' (2015) EHRLR 372.
[139] A Wagner, 'Catgate: another myth used to trash human rights' *The Guardian* 4 October 2011.
[140] See 'Theresa May: UK should quite European Convention on Human Rights' BBC News 25 April 2016; and Anushka Asthana and Rowena Mason, 'UK must leave European convention on human rights, says Theresa May' The Guardian 25 April 2016.
[141] Henry McDonald, 'Tory Plan to Scrap Human Rights Act could Hinder Northern Ireland Peace Process' *The Guardian* 3 October 2014.
[142] Rob Merrick, 'Theresa May to consider axeing Human Rights Act after Brexit, minister reveals' *The Independent* 18 January 2019.
[143] Samuel Osborne, 'Conservative manifesto: Theresa May announces UK will remain part of European Convention of Human Rights' *The Independent* 18 May 2017.
[144] See Dimitrios Giannoulopoulos, 'What has the European Convention on Human Rights ever done for the UK' [2019] EHRLR 1.
[145] James Crisp, 'EU could cancel Brexit security deal if UK quits European Court of Human Rights' *The Telegraph* 18 June 2018.
[146] Outline of the political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, as agreed at negotiators' level on 14 November 2018, <https://ec.europa.eu/commission/publications/outline-political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom-great-britain-and-northern-ireland-agreed-negotiators-level-14-november-2018_en>

the development of common law.[147] These rights, where recognised, are least vulnerable by the Brexit process. However, they provide less effective remedy and would be weakened by the loss of EU Charter and ECHR influence.

The courts may strike down acts and decisions of administrative bodies, Ministers and devolved legislatures if they contravene 'common law constitutional rights' unless the public body is authorised to do so by an Act of Parliament.[148] The courts have held that discretionary powers framed broadly cannot be used to infringe rights, and any such discretionary powers which may impinge on rights must have clear and precise wording.[149] Increasingly, judges may read down the scope of Henry VIII clauses to protect fundamental rights, which could play an important role in limiting the use of delegated powers under the EUWA. However, this is an emerging principle and its scope of application has not yet been made out.[150] Beyond questions of standing and cost (particularly where there is little or no access to legal aid), a higher standard of review is applied in domestic courts where the judicial review action involves a common law right.[151] Where the source of violation comes from an Act of Parliament, the principle of legality can be engaged by the courts to read down legislation,[152] which has served as a powerful tool to avoid the undermining of rights.[153] However, while the Supreme Court has shown a commitment to subvert the relatively clear intention of Parliament particularly where the content concerns what was recognised to be a right of constitutional importance,[154] this is still a less effective remedy than either offered under the HRA or the EU Charter.

There is an essential uncertainty in common law constitutional rights, as 'the jurisprudential approach lacks coherence'.[155] This leads to the question of *which* rights and whether ECHR rights are replicated in the common law, and further whether the established ECHR case law will be reincorporated or re-interpreted into the system. A significant interpretive debt is owed to the introduction of European human rights law to the domestic legal system.[156] In *R (Osborn) v Parole Board*, Lord Reed stated that the common law of human rights falls to be developed 'in accordance with' the HRA when appropriate.[157] Equally, while it could be argued that CJEU jurisprudence could *indirectly* aid future cases through persuasive precedent in the interpretation of UK law, what is lost is the future and the *potential* of the EU Charter, where the 'sheer breadth of rights (and principles) offered in the Charter and their often broader formulation compared with corresponding rights contained in the ECHR, suggest a large potential for stronger human rights protection than currently available.'[158]

Where rights are not recognised, replicated (or replicable), we may see a return to alternative fields of law to replace 'Euro-rights' lost or diminished during the Brexit process. For example, consumer protection is regulated by the Consumer Rights Act 2015 among other primary acts which are in turn based on EU

[147] Writing in 1765, Blackstone identified the genesis of these liberties further to the foundations of the legal system and the Magna Carta, Blackstone Commentaries 1:120-41. See also AV Dicey, Introduction to the Study of the Law of the Constitution (8th edn, Macmillan 1915).
[148] See Christina Lienen, 'Common Law constitutional rights: public law at a crossroads?' [2018] PL 649; and TRS Allan, Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism (Clarendon Press 1994) ch 6.
[149] *R v Home Secretary ex parte Simms* [2000] 2 AC 115, [131].
[150] Fredman et al (n 59).
[151] See eg Conservative Party Manifesto 2015 and its policy document 'Protecting Human Rights in the UK', available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf.
[152] ibid [132]. See TRS Allan, 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 OJLS 563.
[153] Lady Hale, 'What's the point of Human Rights?' (Warwick Law Lecture 2013).
[154] For example, *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557; *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440; and *R(Unison) v Lord Chancellor* [2017] UKSC 51.
[155] Lienen (n 148) 649.
[156] Mark Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) CLP 1. See also See Giannoulopoulos (n 144).
[157] [2013] UKSC 61, [2014] AC 115, [57]
[158] Lock, 'Human rights law in the UK after Brexit' (n 54) 126.

directives:[159] were these to be repealed, recourse for consumers might then return to principles of tort and contract law.[160] Indeed, relative to those rights which are vulnerable to repeal, and critically at risk – these are rights which have been recognised long before the HRA, and (it could be assumed) be least at risk.

An optimistic narrative of the post-Brexit legal landscape is one in which protection of individual rights and liberties at common law enjoy a renaissance, as judges push for a more robust protection of the individual rooted in British constitutional traditions. Indeed, an emerging narrative of common law constitutional rights has 'galvanised public law'.[161] In a searing section of the *Unison* judgment, the Supreme Court affirmed their role in ensuring that the executive carries out its functions in accordance with the law, and as regards its view on Parliamentary democracy,[162] the rule of law,[163] and access to justice which can be regarded as a 'shot across the bow' with reference to future anti-rights policies:

> 'Without such access [to the Courts], laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.'[164]

This cause for optimism is limited, however, by the loss to the common law of the aid of international human rights instruments, institutions and courts in the interpretation and development of the law. A focus on the courts too as the means by which rights can be protected is a narrow approach, predicated on decisions made on a case-by-case basis. While less vulnerable, rights protected at common law will not replace what will be a significant loss for human rights protection post-Brexit.

6. CONCLUSION

There should be little doubt that the Brexit process will have a negative impact on the framework of rights protection in the UK. Even where rights and remedies are not lost, they are critically at risk or significantly and substantially weakened. In the narrative of 'taking back control' spurred by the 'will of the people', the meaning of democracy has become maligned to be the rejection of rights and mechanisms of state accountability – epitomised in the Brexit process in excising the EU Charter of Fundamental Rights as well as the most effective remedies against rights infringement. Political assertions that individuals will enjoy the same if not equal protections following Brexit are unconvincing if not disingenuous: UK citizens will lose rights with their EU citizenship; and resident EU citizens' rights became 'bargaining chips'. The ECHR remains under constant threat; just as worker, consumer, and data rights will become questions of political will, not legal obligation. Even in areas where there is no immediate diminution of rights, there is increased vulnerability and unjust uncertainty. Through the systematic removal of accountability at the highest levels of governance, a vacuum could be created by the Brexit process: a lack of certainty, a loss of protection, and a silence where there was once an acceptance and commitment to protection of individual and fundamental rights across the UK.

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[159] See eg the Equality Act 2010 which implements the EU directives: 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; 2000/78/EC establishing a general framework for equal treatment in employment and occupation; 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); and 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[160] S Fredman, A Bogg, A Young and M Campbell, 'The Human Rights Implications of Brexit' Oxford Human Rights Hub.

[161] Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75 CLJ 86, 86.

[162] See Philip Sales, 'Partnership and challenge: the courts' role in managing the integration of rights and democracy' [2016] PL 456.

[163] See Jeffrey Jowell, 'The Rule of Law's Long Arm: Uncommunicated Decisions' [2004] PL 246.

[164] *R(Unison) v Lord Chancellor* [2017] UKSC 51, at para 58 *per* Lord Reed.